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IN THE

Supreme Court of the United States

OCTOBER TERM 1961

No. 767

REGINALD C. JACKSON,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	3
Statement	4
Reasons for Granting the Writ	10
Conclusion	25

CITATIONS.

B & O Railroad Co. v. U. S., 279 U.S. 781-782, 73 L.Ed. 954 ..... 24, 25

Blocker v. United States, 288 F.2d 853, (1961), 110 U.S.App.D.C. 41 23

Chapman v. United States, 365 U.S. 610 (1961) 14

Corcoran v. United States, 291 F.2d 633 (1961) 14

De Binder v. United States, 292 F.2d 737 (1961), 110 U.S.App.D.C. 244 20

Dixon v. United States, 292 F.2d 768, 110 U.S.App. D.C. 275 ..... 10, 12

Drew v. Beard, 290 F.2d 741 (1961) 19

Green v. United States, 104 U.S.App.D.C. 23, 259 F.2d 180 11

Henry v. United States, 361 U.S. 98 (1959) 12

Holloway v. United States, No. 16,402 ..... App. 29

Johnson v. United States, 333 U.S. 10 (1948) 14

Jones v. United States, 357 U.S. 493 (1958) 14

MacDonald v. United States, 335 U.S. 451 (1948) 14

Mapp v. Ohio, 6 L.ed.2d 1081 14

Plazola v. United States, 291 F.2d 56, (9th Cir. 1961) 13

Public Service Commission v. Wisconsin Telephone Company, 289 U.S. 67-71, 77 L.Ed. 1036 24

PAGE

Taglavore v. *United States*, 291 F.2d 262, (9th Cir. 1961) 13
United States v. *Di Re*, 332 U.S. 581 (1948) 13
United States v. *Fequer*, 192 F.Supp. 377 (1961) 19
United States v. *Merritt*, 293 F.2d 742, (3rd Cir. 1961) 14

CONSTITUTIONAL PROVISIONS

Fourth Amendment 3
Fifth Amendment 4

STATUTES

Title 21 U.S.C. § 174 ..... 3, 21, 22
Title 26 U.S.C. § 4704(a) 4
Title 28 U.S.C. § 1254(1) 2

RULES

5(a) Federal Rules of Criminal Procedure 2, 18, 19

TEXT

21 C.J.S., §217, p. 403, 404 24

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United States of America,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Reginald C. Jackson, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above entitled case on January 11, 1962 and to which Motion for Rehearing was filed, and which Motion for Rehearing was overruled by the United States Court of Appeals for the District of Columbia Circuit on February 2, 1962.

OPINION BELOW

The opinion of the Court of Appeals is as yet not reported. It is set forth in the Appendix to this Petition, page 26.

JURISDICTION

The judgment of the Court of Appeals was entered on January 11, 1962 and affirmed after consideration of Motion for Rehearing on February 2, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. The District Court erred in denying the pretrial motion to suppress evidence and the renewed motion made in that regard at the outset of the trial in this case.

2. That the Trial Judge in the District Court erred in failing to grant petitioner's motions for judgment of acquittal at the end of the prosecution's case, at the end of the entire case and as renewed subsequently at the time of argument for new trial because the verdicts were not supported by substantial evidence and were contrary to the weight of the evidence.

3. That the Trial Judge in the District Court erred in the admission of evidence at the trial in the following respects:

a. The evidence which petitioner contends was illegally seized.

b. Fingerprint evidence because of its unreliability in the light of the overall evidence otherwise produced and because same was obtained after unnecessary delay in violation of Rule 5(a), Federal Rules of Criminal Procedure, and adjudicated cases thereunder.

c. The Trial Court erred in its instructions to the jury on the law of the case.

4. That the failure of the United States Court of Appeals for the District of Columbia Circuit to set forth reasons for its affirmance where substantial questions

were involved, constitutes a denial of due process under the Fifth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution, Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Constitution, Fifth Amendment:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Narcotic Drugs Import & Export Act, § 2, Act of February 9, 1909, c. 100, 36 Stat. 614, as amended, U.S.C. Title 21 § 174:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be

imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. * * *

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Harrison Narcotic Act, § 4704(a), Internal Revenue Code of 1954, c. 736, § 68A Stat. 550, as amended, U.S.C., Title 26 4704(a):

"It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."

STATEMENT

The evidence offered by the prosecution (Tr. 1-229) was to the effect that on the evening of October 24, 1960 the car of the petitioner Reginald C. Jackson, was parked on the west side of 12th Street, facing south, just north of U Street, N.W., and in the car at the time, in addition to petitioner, was one Edward R. Holloway and one Carlton Bryant, the latter two sitting in the front seat and the petitioner sitting in the back seat; that at the time the automobile was parked and the engine running and the heater turned on.

That in due course a Metropolitan Police automobile, in which were Officers Thomas Dldone and David Paul of the Narcotics Squad of the Metropolitan Police, parked on 12th Street, N.W. just north of U Street, N.W., with their car pointing in a northerly direction. That in due

course said officers left their car and proceeded west on U Street and some distance from the car owned and occupied by the petitioner, Officer Didone diverged from Officer Paul and proceeded to the driver's side of the petitioner's car and Officer Paul proceeded to the rider's side or curb side. The latter immediately opened the door on the rider's side and as he was doing this Officer Didone said that he saw Edward R. Holloway, who he claimed was an addict, take his right hand and bring it up to the vicinity of his mouth where he saw some white capsules in it and place them in his mouth; that the said Holloway did not open the door on the driver's side of the car and that he, Officer Didone, yelled to his partner, Officer Paul, that he (meaning Holloway) was eating the capsules; that he then went around the front of the automobile and as he was in front he observed the petitioner sitting in the back seat, throw a white cigarette package out the open door of the automobile on the rider's side, the said door having been opened previously by Officer Paul who was then in the car and grappling with Holloway; that he, Officer Didone, then went to the open door on the rider's side and saw the Viceroy cigarette package on the street and then endeavored to assist Officer Paul in his struggle with Holloway; that he called to a traffic officer who came on the scene and after Officer Paul had opened the door on the driver's side the traffic officer and Officer Paul removed Holloway from the car; that Holloway was searched and two capsules of white powder were found; that thereafter Officer Didone picked up the package from the sidewalk, looked inside and found it contained two cigarettes and a cellophane containing 10 capsules of white powder and a small piece of cardboard folded. (Tr. 9-14).

Officer Didone then testified that he turned the cigarette package with cellophane wrapping thereon over to Sgt. Hayden of the Fingerprint Division of the Metropolitan

Police Department; that Officer Didone then testified that upon recovering the said capsules in the cigarette package he placed the petitioner Jackson under arrest with a charge of the Harrison Narcotics Act.

This officer further testified that the one he recognized when he got to the driver's side of the car was a narcotics user; in addition he indicated that at no time from the first observation of the automobile belonging to the petitioner did that car move.

Counsel for petitioner at this point objected to the admission of the cigarette package and cellophane on the basis that it was obtained in violation of petitioner's rights under the Fourth Amendment to the Constitution, which objection was overruled by the Trial Court.

In this latter connection it is to be pointed out that preliminary motion to suppress evidence seized (J.A. 3-4) along with other motions, had been filed by counsel other than trial counsel and the motion to suppress had been overruled by Judge Edward Tamm of the United States District Court (Tr. Prel. Hearing 125); that at the trial, in the absence of the jury, objection to admission of the evidence was renewed and preliminary testimony was taken from Officer Didone. The renewed objection to the evidence was denied by the Trial Court.

Officer Didone then testified before the jury in greater detail, as did Officer Paul, with respect to the circumstances of the arrest of the petitioner.

Both of these officers in their testimony indicated that the Police Patrol Wagon was sent for and that all three parties in the car were taken to Precinct No. 1 at Headquarters of the Metropolitan Police Department and that out of the presence of the testifying officers the three then defendants were brought before the desk adjoining the Cell Block at No. 1, and on the basis of representations of the officers who had taken the defendants to the

Police Department, the Desk Clerk recorded the detail of the names, ages, addresses, etc., and recorded the fact that each of the three was charged with violation of the Harrison Narcotics Act; the arresting officers did not arrive until sometime later at which time all three defendants were placed in cells; that thereupon Officers Didone and Paul took two of those arrested to the Narcotics Squad Room on the 5th floor of the building and left the petitioner in the cell. This occurred at approximately 8:35 p.m. and the officers, or either of them, were not seen by the petitioner until approximately 11:00 p.m. or shortly thereafter when Officer Didone came to the cell.

At this point it should be indicated that at the trial by way of cross examination both Officer Didone and Officer Paul were confronted with the arrest book which disclosed that in the first instance the petitioner was charged with violation of the Harrison Narcotics Act and that was crossed through followed by Inv., which the Officers testified meant Investigation, and then later the charge of Harrison Narcotics Act was again placed opposite the name of the petitioner. Neither Officer Didone, Officer Paul nor the Precinct Clerk, Anthony L. Zurvalez (Tr. 217) could give any explanation other than to suggest that a mistake had been made. (J.A. 5)

Evidence was offered by the prosecution that the alleged capsules taken from the cigarette package, picked up by Officer Didone at the scene of the arrest, contained narcotic drugs and, moreover, evidence was offered by the prosecution that the alleged cellophane wrapping around the said package on being processed disclosed a fingerprint which it is suggested was a print of the middle left finger of the petitioner on the said alleged cellophane wrapping of Government Exhibit 1A (Tr. 152-3). In this connection it is to be borne in mind that approximately three hours after the arrest of the petitioner and during

which period of time the other two arrested were being interrogated by the same officers of the Narcotics Squad on an upper floor of the building, one of the officers (Didone) came down and asked whether the petitioner had any cigarettes and when shown a practically full package he removed all of the cigarettes therein and then handed them back to the petitioner and kept the empty package. He then brought this petitioner up to the quarters of the Narcotics Squad for processing, including the taking of his fingerprints. The package taken in this instance was never produced at the trial by the prosecution and no evidence given by way of explanation of the failure to do so.

It was also developed during the testimony of Officers Didone and Paul that not only the petitioner but as well Edward R. Holloway and Carlton Bryant were charged with violation of the Narcotics Laws that evening and bail fixed; that the following day all three individuals were before the U. S. Commissioner under sworn complaints made by the officers charging violation of the Narcotics Laws and which complaints are part of the record in this cause; that on that day the matter was continued for hearing until another date and that in the interim the matter was presented originally to the Grand Jury resulting in the indictment of the petitioner and Edward R. Holloway and an ignoring of the charge against Carlton Bryant, notwithstanding the fact that at the trial in this instance both officers said that narcotics were found on Bryant.

After the completion of the testimony of Officers Didone and Paul counsel for the petitioner renewed a motion that had been previously made for leave to inspect the minutes of the testimony of Officers Didone and Paul before the Grand Jury, it being urged to the Court that in light of the situation of the case against Bryant being ignored, it was believed that inconsistencies would be

demonstrated in the Grand Jury minutes insofar as the testimony of both Officer Paul and Officer Didone given at the trial. The Trial Judge denied the renewed application to see the minutes or to review same *in camera*.

Testimony (Tr. 187) was offered by the petitioner in the person of Curtis P. Mitchell, Esquire, a member of this Bar for approximately 19 years, who testified that on the night in question he received a communication directing him to ascertain the situation of the petitioner Reginald C. Jackson; that thereupon at a time when he was at his own office working, shortly after 10:00 p.m., he called the Narcotics Squad at Police Headquarters and talked to a person that he believed was Officer Didone, but that in any event, he was sure it was Officer Didone or Officer Paul, both of whom he knew well; that he made inquiry as to whether or not they had the petitioner Reginald C. Jackson in custody and was told that they did and when asked as to the charge it was indicated that he (meaning the petitioner) was charged with Investigation; that after certain other conversations he was told to call back and he did so at or about 11:00 p.m., perhaps between 11:00 and 12:00 p.m.; he further testified that on the occasion of the second call he definitely remembered that he talked to Officer Didone who then informed him that they had charged the petitioner under the Harrison Narcotics Act and thereupon the the witness went to Headquarters and conferred both with the police and the petitioner, at which conference the petitioner denied the assertion of the police that he had thrown a package of cigarettes out of the car (Tr. 187-210).

Rebuttal testimony was offered by the prosecution through the medium of Officers Didone and Paul that the conversations indicated by Mr. Mitchell had not occurred as detailed, after which testimony in the case was terminated.

At the termination of the prosecution's main case and the termination of all the evidence, the petitioner through his counsel moved the Court for a judgment of acquittal on the basis that the evidence in its then status was so incredible as to preclude any determination of guilt of the petitioner in the light of fundamental principles of law applicable. (Tr. 186-230, J.A. 8-9).

REASONS FOR GRANTING THE WRIT

I.

The District Court Erred in Denying the Pretrial Motion to Suppress Evidence and the Renewed Motion Made in That Regard at the Outset of the Trial in This Case.

The prosecution attempts only to support the entrance of the automobile, the subsequent seizures and the arrest of the defendants, on the basis of the suggested fact that as they approached the automobile one of the officers recognized one of the men in the front seat (Holloway) as an addict and later saw him raise white capsules to his mouth.

Petitioner believes that the opinion of Judge Prettyman in *Dixon* v. *United States*, 292 F.2d 768, 110 U.S. App.D.C. 275, assembling as it does in Footnote 1 most of the cases on the subject matter both in the United States Court of Appeals for the District of Columbia Circuit and in this Honorable Court, gives the complete demonstration of why there is a lack of probable cause for the actions of the officers in this case.

As pointed out by Judge Prettyman in this *Dixon* case (*supra*), "Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed." It is respectfully suggested that there exists in this instance no picture such as pointed to by Judge Prettyman

when he wrote "Four men, one known to be a safe-breaker, meeting upon signal, handling women's clothes, including a fur piece, bearing price tags or labels, on the curb of a narrow street at midnight, could well induce a reasonably prudent police officer to conclude that a larceny, robbery, housebreaking, or some similar offense had been, was being, or was about to be committed."

Certainly the circumstances of this case point to no such accumulation as being before the officers on the occasion when they made their entry into the car. Indeed, the evidence points to the fact that one of the officers had opened the rider's side of the car even before the other officer had called to suggest the fact that the one man (Holloway) was swallowing capsules.

It is further urged to the Court that there is no conduct by the petitioner independent of the other occupants of the car that would cast this case within the concept pronounced by the United States Court of Appeals for the District of Columbia Circuit in *Green v. United States*, 104 U.S.App.D.C. 23, 259 F.2d 180. Could it be said that because officers saw what they claimed was a known addict looking out of a window of a home that they would thereby have a right to break and enter that home even if, in the indulgence of their speculation, they conceived that he *might* be swallowing some capsules that *might* be narcotics?

In connection with this search and seizure and also as pointed to in Case No. 16402, *Holloway v. United States* before the U.S. Court of Appeals for the District of Columbia Circuit, there has been some suggestion that probable cause could possibly be based on an alleged traffic violation. The fact is that there is substantial law in the form of adjudicated cases that could be cited to this Court that there can be no traffic violation unless the vehicle is being "operated", which, as the decisions indicate, means a moving violation. However, petitioner deems it un-

necessary to discuss this phase because he directs the Court's attention to the remarks of the prosecutor made to the Court in this case as follows:

> "When the defendant proceeded to place the capsules in his mouth, then the probable cause came into being, and then the officer had a right to go into action to make an arrest for felony, which he did, and I don't have any difficulty with this case." (Tr. 23)

In this connection the Court's attention is also directed to Page 120 of the Transcript of Preliminary Hearing had before Judge Tamm on the motion to suppress, in which Mr. Flannery stated as follows:

> "The arrests were not made for traffic violations. The Government does not contend there was probable cause to arrest Holloway for a traffic violation."

This clearly demonstrates that the prosecutor fully appreciated that the hint of traffic violation offered no basis for support of probable cause in this case.

In *Henry* v. *United States*, 361 U.S. 98 (1959), amongst others cited by Judge Prettyman in the *Dixon* case (*supra*), the arrest was made on a basis of a possible theft of whiskey and in that case there were many details set forth as to observations made by the police before the arrest. It developed after the arrest that the cartons contained stolen radios. The conviction of the individuals for possession of stolen radios was set aside on the basis of insufficient probable cause.

In the instant case the officers had no background of suggested crime having been committed and even assuming the fact to be that Holloway was seen putting capsules in his mouth, there could be no more basis for believing such contained narcotics than that the cartons in the *Henry* case (*supra*) contained the stolen whiskey. Again attention is called to the fact that the evidence

shows that Officer Paul was already making entrance into the rider's side of the automobile.

In the case of *Taglavore* v. *United States*, 291 F.2d 262 (9th Cir.) the facts were quite similar to those in the instant case. The Ninth Circuit reversed a conviction for narcotics violation even though the arrests were supposedly made on the basis of two minor traffic violations and said reversal was for the reason that there was no probable cause to make the arrest for a narcotics violation. The Court in this case repeats the often suggested principle that "more than bare suspicion" is required to support probable cause.

It is respectfully submitted that there is far less evidence to support the arrest in this case than existed in *Taglavore* (*supra*).

In the case of *Plazola* v. *United States*, 291 F.2d 56 (9th Cir. 1961) it is pointed out that the officers' belief about a person's past activities cannot operate to sustain a denial of his rights under the Fourth Amendment to the Constitution and in this case the Court stated at page 58-59:

> "While there undoubtedly was in the minds of the customs officers a general belief that appellant had in the past smuggled marijuana into the United States • • • we do not believe such a general belief as to past actions, unrelated to present conduct, or additional reliable information, would constitute more than suspicion that the suspect was likely to do it again • • •. We reject any such theory as being contrary to the purpose of the provisions of the Fourth Amendment."

The Constitutional protection that prohibits officers from breaking into a house has equal application in connection with an automobile in which the doors are closed and the windows are up. *United States* v. *Di Re*, 332 U.S. 581 (1948).

In this latter case the following pertinent observation was made by the late Justice Jackson at page 587:

> "We are not convinced that a person, by mere presence in a suspected car loses immunities from search of his person to which he would otherwise be entitled."

Petitioner suggests to the Court that the case of *United States* v. *Merritt*, decided in the Third Circuit, and reported in 293 F.2d at page 742, gives the complete answer to the contentions of the prosecution in this case.

In the *Merritt* case (*supra*) the officers were illegally executing a search warrant of a house at night, without such authority being given in the search warrant. At the time of the search under said warrant, the defendant threw packages, subsequently found to contain heroin, out a window in view and presence of Government officers and the Court stated that such action did not render the search valid and reversed the conviction.

Principles heretofore indicated are sustained in the following additional cases:

Chapman v. *United States* (1961), 365 U.S. 610;
Jones v. *United States* (1958), 357 U.S. 493;
MacDonald v. *United States* (1948), 335 U.S. 451;
Johnson v. *United States* (1948), 333 U.S. 10;
Mapp v. *Ohio*, 6 L.ed. 2d 1081;
Corcoran v. *United States* (1961), 291 F.2d 633.

II.

That the Trial Judge in the District Court Erred in Failing to Grant Petitioner's Motions for Judgment of Acquittal at the End of the Prosecution's Case, at the End of the Entire Case and as Renewed Subsequently at the Time of Argument for New Trial Because the Verdicts Were Not Supported by Substantial Evidence and Were Contrary to the Weight of the Evidence.

It should be borne in mind in connection with this suggested error that the conviction in this case stands solely and exclusively on the aspect of an alleged fingerprint suggested as being on the middle portion of the cellophane wrapping around the package of cigarettes which it is contended contained capsules of narcotics and which it was suggested by Officer Didone had been thrown through the open door on the rider's side of the car by the petitioner.

Further in this connection it is important to remember that this same officer testified (Tr. 50) that on the corner where the petitioner's automobile was located, there was no street light, that the only street light was on the northeast corner near where the police car was parked. Under such circumstances doesn't the testimony that an officer standing in front of the petitioner's automobile, intending to go to the rider's side of the automobile, at that point could see an individual in the back seat throwing a package out the door of the car, appear beyond credibility?

The Police Department Fingerprint Expert testified that there was no other fingerprint on the cellophane except the one on one of the larger sides of the cellophane wrapping. In this connection it would seem logical to first consider the question of how anyone throwing a package of cigarettes would hold that package. Is it not logical that independent of the middle finger of his left hand, in order to accomplish the desired results, that

he would have at least had the thumb of the left hand on the other side of the package and that under such circumstances there would at least be one other fingerprint more likely on the side that the thumb was attached to? It is utterly fantastic to think that the petitioner balanced the package of cigarettes on the middle finger of his left hand and in that respect threw the package out the open door. (Tr. 152).

Again is it not significant that not another fingerprint was found on the cellophane wrapping? This notwithstanding the fact that Officer Didone at the instance of petitioner's counsel, demonstrated how after the cigarettes had been thrown out the open door, he picked them up by grasping the package with his thumb on the one side and at least three fingers on the other side. (Tr. 53-57).

The story does not stop here, however, because isn't it apparent that at the time that they took this petitioner to Police Headquarters they did not conceive that they had a case against him? Is it logical that a Desk Clerk would write a violation Harrison Narcotics Act, cross it out and write Inv., meaning Investigation, and then later write again violation Harrison Narcotics Act? Concededly from the testimony of the Desk Clerk the entries were made at the instance of the patrol officer who brought the defendants to the Police Station (Tr. 163). Certainly it would appear apparent that when the officers involved in the arrest came and looked at the entry, knowing the circumstances of the case as far as the petitioner was concerned that they then directed that the charge be crossed out and in lieu thereof there be set forth Inv., meaning Investigation. But this is not all. We have a call coming to that Precinct later and one of these officers being talked to with reference to the situation as to the petitioner (Tr. 187-210) and the officer confirming the fact that the charge then laid against the petitioner was Investigation. The very murky picture

does not end here. We must have in mind the fact that the petitioner was kept downstairs for approximately three hours while the other two that had been arrested were taken up to the Narcotics Squad Room, not only processed but of necessity at that time interrogated at length. And then what happened? Officer Didone comes downstairs with the other two, places them in their respective cells, goes to the petitioner in this case, talks to him through the bars and asks him if he has any cigarettes (Tr. 81-83). The petitioner obligingly hands him a package which is practically full and thereupon that officer empties all of the cigarettes from the package, keeps the wrapping and returns the cigarettes to the petitioner. Could there be any doubt that when the petitioner took from his pocket the practically full package of cigarettes that he held them as any normal person would have held them and that amongst other fingers that would be grasping the wrapping as he held it with his left hand would be the left middle finger and undoubtedly other fingers of that hand and on the other side of the package his thumb? The question is presented to this Court as it was to the lower court and to the jury—where is that package and, moreover, why was it ever taken from the petitioner? Could it be that as of the time that the package was taken from the petitioner that there was no case against him and that it was only made after the fingerprint was taken from the cellophane of that second package and then compared with the fingerprints of the petitioner that were taken three hours following his arrest?

This Court's attention is directed to the testimony of the co-defendant Holloway, also an appellant before the United States Court of Appeals for the District of Columbia Circuit, No. 16402, Holloway v. United States, given at hearing on motion for judgment of acquittal or motion for new trial and supplementary motion for judgment of acquittal or motion for new trial (J.A. 89).

that the following occurred at Headquarters during the time that Holloway and the other man arrested, Bryant, were upstairs in the Narcotics Squad Room with the officers:

"Q. Did there come a time later, when you talked at the District Building, when you heard either Officer Paul or Didone say anything?

"A. I heard Officer Paul say that he had seen Carlton Bryant throw a cigarette package out of the car and he said in which there were some capsules." (Suppl. Tr. 5).

III.

That the Trial Judge in the District Court Erred in the Admission of Evidence at the Trial in the Following Respects:

a. ***The Evidence Which Petitioner Contends Was Illegally Seized.***

b. ***Fingerprint Evidence Because of Its Unreliability in the Light of the Overall Evidence Otherwise Produced and Because Same Was Obtained After Unnecessary Delay in Violation of Rule 5(a), Federal Rules of Criminal Procedure, and Adjudicated Cases Thereunder.***

c. ***The Trial Court Erred in Its Instructions to the Jury on the Law of the Case.***

Petitioner believes that the Respondent will contend in this case that Rule 5(a), Federal Rules of Criminal Procedure, covering the situation of an arrest and failure to bring the arrested individual without unreasonable delay before a U. S. Commissioner or a committing magistrate applies only to the situation of confessions. It is respectfully submitted, without citation of the many cases in the United States Court of Appeals for the District of Columbia Circuit and in this Court which have come

to be known as the Mallory rule, do not in words or otherwise suggest that it is only statements that would be excluded in the face of violation of Rule 5(a). The only logical interpretation of the Rule is that any evidence acquired incident to the unreasonable delay is not admissible under the Rule. See *United States v. Fetter*, 192 F.Supp. 377 (1961).

Testimony offered by the prosecution indicates that the following day all three individuals who had been arrested were brought before the U. S. Commissioner in and for the District of Columbia, and were there arraigned on complaints that had been sworn to by one or the other of these officers and in each instance the individual was charged with violation of Harrison Narcotics Act. (See U.S. Commissioner papers on file with the record in this cause.)

The case was continued to a later date for hearing and as indicated by the testimony at the trial (Tr. 73-78) the hearing in the case was continued and that before the new date set for hearing the matter was presented originally to the Grand Jury in and for the District of Columbia, resulting in the indictment of this petitioner and the defendant Holloway, and the case was ignored against the then defendant Bryant.

This Court's attention is first directed to *Drew v. Beard* 290 F.2d 741 (1961) in which it is pointed out that persons accused of crime are entitled to prompt preliminary hearing and the fact that accused is at liberty on bond does not in itself constitute reason for denying him prompt preliminary hearing (FRCrP 5(a)).

In addition, the petitioner would advise this Court that preliminary motion for inspection of the Grand Jury Minutes was made by the petitioner and heard by Judge Tamm, and the motion was denied as appears in Transcript of said preliminary hearing (p. 125) and which is part of the record in this cause.

This motion was filed with a view of ascertaining the reason why the case against Bryant was ignored in the face of the officer's sworn testimony before the Commissioner that he had possessed narcotics.

The petitioner in this cause renewed the application for inspection of the Grand Jury Minutes (Tr. 7-25) at which time the Trial Judge denied the renewed application.

It is suggested to this Court that in light of the overall picture and the testimony as to the background of the third man arrested (Carlton Bryant) that the motion for inspection of the Grand Jury Minutes should have been granted, and this particularly in the fact of the testimony given by Officer Didone at the trial with reference to the said Carlton Bryant (Tr. 78), and the said Carlton Bryant, along with others, is on appeal before the U.S. Court of Appeals for the District of Columbia Circuit, in Cause No. 16135.

In this latter connection it is respectfully urged to this Court that there was as much, if not more, reason existing why said Minutes should have been made available to the petitioner as existed in the case of De Binder v. United States, 292 F.2d 737 (1961), 110 U.S.App.D.C. 244, wherein the Court reversing because of failure to grant a request for Grand Jury Minutes, stated as follows:

> "• • •. Here the prosecution's case rested largely upon the testimony of a sole, key, eyewitness. While there is no requirement that the defense make a preliminary showing that contradictions exist between the witness' testimony before the grand jury and her testimony at trial, id., 360 U.S. at page 401, 79 S.Ct. at page 1241, the trial judge would nevertheless be bound to consider evidence suggesting the possibility of such inconsistencies in exercising his discretion. We find in the record before us ample ground for such suspicion. Given the immediacy of

appellant's need, and the apparent reasonableness of his claim, we believe that the trial judge abused his discretion under Fed. R. Crim. P. 6(e), 18 U.S.C.A., in failing to order production of those parts of the witness' grand jury testimony which relate to the same subjects testified to at trial."

It is respectfully urged to the Court that that portion of the Trial Judge's charge beginning on page 242 and ending on page 244, reading as follows:

"Now the law does not require strict proof of a sale, purchase, dispensing, or distribution of a drug. The statute or law, in other words, goes on to state: The absence of appropriate tax-paid stamps of narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

"In other words, if it has been proven beyond a reasonable doubt that the defendant had possession of this drug and that while in his possession there were no appropriate taxpaid stamps for those drugs, those facts constitute what is known in the law as prima facie evidence of a violation of the statute, and the jury may find the defendant guilty on that charge if it sees fit to do so without requiring any further proof.

"Now what do we mean by prima facie evidence? It means simply this: Prima facie evidence means a fact presumed to be true unless disproved by some evidence to the contrary. Although the indictment under count three reads, purchased, sold, dispensed and distributed not in the original stamped package and not from the original stamped package, it is sufficient for a conviction if you find that the Government has proved beyond a reasonable doubt that the defendant either purchased, sold, dispensed, or distributed the drug not in or from the original stamped package.

"Title 21 of the United States Code, Section 174, the statute or law in other words under which count four of the indictment is drawn reads as follows:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug, after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, such person shall be punished as the statute provides."

"And the statute further states:

> "Whenever on trial for a violation of this section, the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

"Count four of the indictment which is drawn under the statute which I have just read to you reads as follows:

> "On or about October 24, 1960, within the District of Columbia, Reginald C. Jackson, facilitated the concealment and sale of narcotic drugs, that is, 10 capsules containing a mixture totaling about 390 milligrams of heroin hydrochloride, quinine hydrochloride, and mannitol after said heroin hydrochloride had been imported with the knowledge of Reginald C. Jackson, into the United States contrary to law.
>
> "That is the same heroin and hydrochloride which is mentioned in the third count of this indictment."

delivered in the isolated manner indicated, of necessity worked a prejudice against the petitioner.

This Court and the United States Court of Appeals for the District of Columbia Circuit have approved the presumption provisions of both statutes but not under cir-

cumstances that are calculated to be destructive of fundamental general principles such as presumption of innocence, burden of proof, no burden on the defendant and no inference to be drawn because of lack of proof offered by the defendant.

Petitioner contends that the manner in which this charge was given to the jury was calculated to be as misleading and confusing to the jury as was the charge on the question of insanity and the burdens involved in the case of *Blocker* v. *United States*, 288 F.2d 853 (1961) 110 U.S. App.D.C. 41.

IV.

That the Failure of the United States Court of Appeals for the District of Columbia Circuit to Set Forth Reasons for Its Affirmance Where Substantial Questions Were Involved, Constitutes a Denial of Due Process Under the Fifth Amendment to the United States Constitution.

The opinion of the United States Court of Appeals for the District of Columbia Circuit as set forth in the Pet. App. to this Petition is for all practical purposes contained in the last paragraph of said alleged opinion and reads as follows:

> "On this appeal the principal points are that the heroin contained in the package was inadmissible as evidence, that fingerprint evidence was inadmissible, and that the trial judge erred in failing to grant motions for judgment of acquittal. We find no error."

The petitioner respectfully suggests to this Honorable Court that the errors assigned in this case are substantial and that the said errors were properly preserved in the trial court. The failure of the Appellate Court to meet the challenge of these substantial questions represents a denial of true justice to this petitioner.

This case being a narcotics case, which under any circumstances is most difficult to defend against because of the general prejudice and abhorence of most individuals for the trafficking in drugs, makes the failure to support the Court's decision by full opinion a most extreme denial of justice to the petitioner.

In 21 C.J.S., Section 217, page 403, 404, the principle herein involved is generally stated as follows:

> "However, even though an opinion is not required by statute, one should be written when the case involves the application of an old principle, a restatement of which is necessary, or where the question is one of great public interest or importance or difficulty."

Petitioner would point out that the conviction had in this instance was after a second trial of the cause. The first trial ended in a mistrial, the jury being discharged because they were hopelessly disagreed. The actual time of deliberation indulged by the jury in the second trial was approximately twenty minutes when the verdict was returned.

The aggregate of the evidence touching the conduct of the police in this case should have caused the Appellate Court to meet the challenge in detail.

This Honorable Court in *Public Service Commission* v. *Wisconsin Telephone Company*, 289 U.S. 67-71, 77 L.Ed. 1036, stated:

> "We have repeatedly emphasized the importance of a statement of the grounds of decision, both as to facts and law, as an aid to litigants and to this court."

Likewise in the case of *B & O Railroad Co.* v. *U.S.*, 279 U.S. 781-782, 73 L.Ed. 954, this Honorable Court said:

> "The questions were important and the amounts involved were large. The judges should have given the reasons on which they rested their decisions."

The failure of the United States Court of Appeals for the District of Columbia Circuit to delineate its reasons for affirmance is even more difficult to understand in the light of the fact that the Appellee's printed brief before that Court consisted of 42 pages. This certainly would not seem to suggest that the United States Attorney's Office for the District of Columbia believed that the points urged by the petitioner were trivial and required only such a per curiam opinion as has been above discussed.

CONCLUSION

For the foregoing reasons it is sincerely urged that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

William H. Collins
Shoreham Building
Washington 5, D. C.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16635

REGINALD C. JACKSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

Decided January 11, 1962

Mr. William H. Collins for appellant.

Mr. Anthony G. Amsterdam, Assistant United States Attorney, with whom *Mr. David C. Acheson*, United States Attorney, and *Messrs. Nathan J. Paulson* and *Thomas A. Flannery*, Assistant United States Attorneys, were on the brief, for appellee. *Mr. Arnold T. Aikens*, Assistant United States Attorney, also entered an appearance for appellee.

Before EDGERTON, PRETTYMAN and FAHY, Circuit Judges.

PER CURIAM: This is an appeal from a conviction for violation of the narcotics laws and is a companion case to No. 16402, *Holloway* v. *United States*, decided today. The first part of the series of events involved in these two cases is related in the opinion in *Holloway*. Appellant Jackson was one of the three men in the automobile involved. He was in the rear seat as the officers approached. After the officer had opened the curbside door of the car, both officers saw Jackson throw a package, which appeared to be a pack of cigarettes, through the open door onto the sidewalk. The officers retrieved the package and found

that it contained two cigarettes, a piece of a match cover, and ten capsules which were later found to contain heroin.

On this appeal the principal points are that the heroin contained in the package was inadmissible as evidence, that fingerprint evidence was inadmissible, and that the trial judge erred in failing to grant motions for judgment of acquittal. We find no error.

Affirmed.

Filed January 11, 1962, Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1961

Criminal 960-60
No. 16,635

REGINALD C. JACKSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

Before: Edgerton, Prettyman and Fahy, Circuit Judges.

JUDGMENT

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Curiam.

Dated: January 11, 1962

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16402

EDWARD R. HOLLOWAY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

Decided January 11, 1962

Mr. Franklin M. Schultz (appointed by this court), with whom *Mr. Charles F. Mooke* (appointed by this court) was on the brief, for appellant.

Mr. Anthony G. Amsterdam, Assistant United States Attorney, with whom *Mr. David C. Acheson*, United States Attorney, and *Messrs. Nathan J. Paulson* and *Thomas A. Flannery*, Assistant United States Attorneys, were on the brief, for appellee. *Mr. Charles T. Duncan*, Principal Assistant United States Attorney, also entered an appearance for appellee.

Before EDGERTON, PRETTYMAN and FAHY, Circuit Judges.

PER CURIAM: This is an appeal from a judgment of conviction for violation of the narcotics laws. Three men were seated in an automobile, parked by the curb with the motor running. Holloway was in the driver's seat. Two police officers, on police business unrelated to any of these three, were passing by. They recognized Holloway as a known addict, and they knew he did not have an automobile driver's license. They stopped to inquire. Holloway refused to display a license or to open the car door. He made a gesture toward his mouth with his

right hand; one officer observed white capsules in his hand and called out to his brother officer, "He is eating the caps." Thereupon the latter officer opened the curb-side door and placed Holloway under arrest. Heroin was found in Holloway's pocket.

The points on this appeal are, principally, that the heroin taken from Holloway's pocket was inadmissible as evidence and that the trial judge should have directed a verdict of acquittal or granted a motion for a new trial. We find no error.

A companion case, No. 16635, *Jackson* v. *United States*, is also decided today.

Affirmed.